

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 BRENT MORRIS,

3:16-cv-00604-MMD-VPC

5 Plaintiff,

6 v.

REPORT AND RECOMMENDATION OF
U.S. MAGISTRATE JUDGE

7 NEVADA GAMING CONTROL BOARD,
8 *et al.*,

Defendants.

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11 This Report and Recommendation is made to the Honorable Miranda M. Du, United
12 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
13 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is Brent Morris's ("plaintiff") application
14 to proceed *in forma pauperis* (ECF No. 1) and *pro se* complaint (ECF No. 1-1). Having reviewed
15 the record, the court recommends that plaintiff's application to proceed *in forma pauperis* be
16 granted, and that the complaint be dismissed with prejudice.

17 **I. IN FORMA PAUPERIS APPLICATION**

18 As set forth in 28 U.S.C. § 1915(a), the court may authorize a plaintiff to proceed *in*
19 *forma pauperis* if he or she is unable to pay the prescribed court fees. The plaintiff need not "be
20 absolutely destitute to enjoy the benefits of the statute." *Adkins v. E.I. DuPont de Nemours &*
21 *Co.*, 335 U.S. 331, 339 (1948). Based on the financial information provided in his application to
22 proceed *in forma pauperis*, the court finds that plaintiff is unable to pay the filing fee in this
23 matter. (See ECF No. 1.) Accordingly, the court recommends that plaintiff's application to
24 proceed *in forma pauperis* be granted.

25 **II. LEGAL STANDARD**

26 Applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915. Section
27 1915 provides, in relevant part, that "the court shall dismiss the case at any time if the court
28 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon

1 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune
2 from such relief.” 28 U.S.C. § 1915(e)(2)(B). Dismissal of a complaint for failure to state a
3 claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure
4 12(b)(6), and the court applies the same standard under section 1915 when reviewing the
5 adequacy of a complaint or amended complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th
6 Cir. 2000).

7 Under Rule 12(b)(6), the court must dismiss the complaint if it fails to “state a claim for
8 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts
9 accept as true all well-pled factual allegations, set aside legal conclusions, and verify that the
10 factual allegations state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
11 Although the complaint need not contain detailed factual allegations, it must offer more than “a
12 formulaic recitation of the elements of a cause of action” and “raise a right to relief above a
13 speculative level.” *Twombly*, 550 U.S. at 555.

14 The complaint is construed in a light most favorable to the plaintiff. *Chubb Custom Ins.*
15 *Co. v. Space Systems/Loral Inc.*, 710 F.3d 946, 956 (9th Cir. 2013). The court takes particular
16 care when reviewing the pleadings of a *pro se* party, for a more forgiving standard applies to
17 litigants not represented by counsel. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Still, a
18 liberal construction may not be used to supply an essential element of the claim not initially pled.
19 *Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992). If dismissal is appropriate, the *pro se*
20 plaintiff should be given leave to amend the complaint, and some notice of its deficiencies, unless
21 it is clear that those deficiencies cannot be cured. *Cato v. United States*, 70 F.3d 1103, 1107 (9th
22 Cir. 1995).

23 III. DISCUSSION

24 Plaintiff’s complaint alleges various civil rights claims pursuant to 42 U.S.C. § 1983 for
25 alleged constitutional violations stemming from plaintiff’s arrest, trial, and conviction in Nevada
26 state court. (ECF No. 1-1.) Plaintiff sues defendants Rachel Martines (“Martines”), Boyd
27 Gaming Corporation, the Orleans Hotel and Casino (“Orleans”), Elizabeth Sobczak (“Sobczak”),
28 Jeffery Fine (“Fine”), and Mitchell Caberto (“Caberto”). (*Id.* at 2-3.) Plaintiff alleges that on

1 September 22, 2010, he was unlawfully arrested by Nevada Gaming Control Board agent
2 Martines. (*Id.* at 5.) Upon his arrest, plaintiff alleges he was searched and had \$768.00 in
3 Caesars gaming chips and \$5,000.00 in Orleans gaming chips seized. (*Id.*) Plaintiff asserts that
4 the seizure of the chips was illegal and there was a lack of probable cause for his arrest. (*Id.* at 4-
5 7.) Further, plaintiff asserts that he was subjected to a malicious prosecution on charges of
6 cheating at the Orleans, which he alleges were subsequently dismissed. (*Id.* at 8.)

7 This is not plaintiff's first attempt to litigate the facts of this case. Aside from state court
8 actions, plaintiff has filed two nearly identical cases in this district. *See Morris v. Orleans Hotel*
9 *and Casino*, 2:12-cv-01683-JCM-CWH (dismissed as frivolous and for failure to state a claim)
10 and *Morris v. Caberto*, Case No. 2:16-cv-02416-GMN-NJK (barred by claim preclusion and
11 dismissed with prejudice). The court notes that duplicative litigation by a plaintiff proceeding *in*
12 *forma pauperis* may be dismissed as malicious under 28 U.S.C. § 1915(e). *See Cato*, 70 F.3d at
13 1105 n.2 (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988) (holding that repetitious
14 litigation of virtually identical causes of action is subject to dismissal as malicious)); *Pittman v.*
15 *Moore*, 980 F.2d 994, 994-95 (5th Cir. 1993) (holding that it is malicious for a "pauper" to file a
16 lawsuit that duplicates allegations of another pending federal lawsuit by the same plaintiff). As
17 such, plaintiff's complaint should be dismissed as malicious with prejudice.

18 IV. CONCLUSION

19 Consistent with the foregoing, the court concludes that dismissal is warranted under 28
20 U.S.C. 1915(e)(2)(B)(i). Because amendment would be futile, the dismissal should be with
21 prejudice. *See Cato*, 70 F.3d at 1106.

22 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
23 Practice, the parties may file specific written objections to this Report and Recommendation
24 within fourteen days of receipt. These objections should be entitled "Objections to Magistrate
25 Judge's Report and Recommendation" and should be accompanied by points and authorities for
26 consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that plaintiff's application to proceed *in forma pauperis* (ECF No. 1) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the Clerk **FILE** plaintiff's complaint (ECF No. 1-1);

IT IS FURTHER RECOMMENDED that the complaint (ECF No. 1-1) be
DISMISSED WITH PREJUDICE.

DATED: July 5, 2017.

Valerie P. Poole
UNITED STATES MAGISTRATE JUDGE